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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOEL B. HENDERSON, Defendant and Appellant.	D043082 (Super. Ct. No. SCD169260)

APPEAL from a judgment of the Superior Court of San Diego County, Gale E. Kaneshiro, Judge. Affirmed.

Joel B. Henderson was convicted of robbery and, because of his criminal record, was sentenced to a total of 15 years in prison. According to the prosecution's witnesses, the robbery occurred when, following Henderson's theft of an automobile gauge from a retail store, he forcibly resisted the attempt of two store employees to retrieve the gauge. At trial Henderson presented testimony from a companion who stated that no theft occurred. Consistent with the testimony offered by his companion, Henderson's trial

counsel argued the prosecution had failed to present any proof of the underlying theft and Henderson therefore had the right to resist the store employees' efforts to restrain him.

Henderson appeals, arguing the trial court erred in denying his post-trial motion for jury identification information. He also argues the trial court erred in giving the jury an instruction on force which stated that more than accidental force was required to commit robbery and in failing, *sua sponte*, to give an instruction on petty theft as a lesser included offense. Finally, he argues that in imposing the upper term for robbery the trial court violated his Sixth Amendment rights as articulated in *Blakely v. Washington* (2004) ___U.S.___ [124 S.Ct. 2531] (*Blakely*.)

We find no error and affirm. Henderson's request for jury identification information was predicated on his belief that during the course of the jury's deliberations one of the juror's may have been subject to inappropriate coercion by the other jurors. However, the record does not suggest anything more than the vehement and strenuous jury room discussion which our courts have uniformly protected from intrusion. Thus the trial court did not abuse its discretion in denying Henderson's request for juror information.

The trial court's instruction on force was accurate and, taken together with instructions the trial court gave on robbery, did not mislead the jury or diminish the prosecution's burden. Moreover, because in this case there was no dispute that an altercation occurred outside the retail store, if a crime occurred the crime was robbery, not petty theft. Under those circumstances the trial court was not required to *sua sponte* instruct the jury on petty theft.

Finally, even if we assume that our determinate sentencing law is defective under *Blakely*, in sentencing Henderson the trial court could still consider his criminal history without infringing on his right to a jury trial. The record is clear on the basis of that history alone the trial court would have given Henderson the upper term on his robbery conviction. Thus under no set of circumstances is the sentence imposed subject to attack.

SUMMARY

A. *Prosecution Case*

On August 12, 2002, Melanie Shawcroft, a loss prevention officer at a Wal-Mart store in San Diego, saw Henderson and his companion Sherrie Pulliam in the garden area of the store. Shawcroft had seen Pulliam in the store on prior occasions.

Shawcroft saw Henderson and Pulliam leave the garden area, where they had been looking at plants, and go to the automotive section of the store. Shaw unobtrusively followed them to the automotive section, where she saw Pulliam hand Henderson a packaged automobile gauge. Shawcroft saw Henderson, with Pulliam's help, open the package and put the gauge in his right back pocket. Shawcroft also saw Henderson put the empty package back on the shelf.

Henderson and Pulliam left the store without going through any sales counters and without paying for the gauge. Outside the store, Shawcroft, who by that time was accompanied by another Wal-Mart employee, Israel Gutierrez, attempted to stop Henderson and Pulliam. She asked Henderson to return to the store with her and Henderson refused. When Shawcroft touched Henderson on the wrist, he pushed her in the chest with both his hands. Shawcroft is 5-feet, 6-inches tall and at the time weighed

112 pounds; Henderson is 5-foot, 9-inches tall and weighs 210 pounds. Although Shawcroft had pulled out her handcuffs, she decided that she would not be able to get them on Henderson and put them away. As Shawcroft put the handcuffs away, Pulliam told Shawcroft "Bitch, I'm going to kick your ass."

After Henderson pushed Shawcroft, he and Pulliam continued walking to their vehicle and Shawcroft again tried to grab Henderson's wrist. He again pushed Shawcroft in the chest with both his hands. He then pulled his arm back and made a fist. Because Shawcroft thought Henderson was about to hit her, she grabbed Henderson's shirt and attempted to pull herself as close to him as possible so that he would not be able to hit her with a complete swing of his arm.

At that point Gutierrez tried to intervene and grab Henderson's hand. Henderson told Gutierrez: "I have a knife. Don't even try it." Henderson then successfully pulled away from Shawcroft, but ripped his shirt in doing so. Henderson and Pulliam got in their truck and left the store parking lot. Two small children were in the truck.

Shawcroft returned to the automotive section of the store and retrieved the empty package. She then called the police and gave them the license number of the truck Henderson was driving. Police went to the address of the registered owner of the truck, where they found Henderson, Pulliam and two children about 10 feet from the truck. Shawcroft and Gutierrez went to the address and identified Henderson and Pulliam as the individuals involved in the theft and altercation outside the store.

Police found an instruction manual for a gauge kit in the cab of the truck and two knives in the bed of the truck. Police also found 284 grams of marijuana in a backpack that was in a trailer attached to the truck.

B. *Defense Case*

A Wal-Mart customer, Randolph Heilman, was in the parking lot at the time Shawcroft attempted to stop Henderson. He saw Pulliam yell at Shawcroft and saw Henderson pull some papers from his pocket and try to show them to Shawcroft. Heilman saw Shawcroft attempt to handcuff Henderson and saw Henderson raise his arm in what Heilman thought was a defensive motion. Heilman then saw Shawcroft lunge at Henderson. Heilman believed Shawcroft was the aggressor in the altercation. Heilman did see what he thought was a shiny torque driver in Henderson's back pocket.

Pulliam testified she and Henderson went to Wal-Mart to get plant "care cards" from the garden department of the store. According to Pulliam, in addition to the care cards, Henderson took an instruction manual out of an empty package in the store. She also testified Henderson had a tool he used on his chain saws in his back pocket. Finally, Pulliam testified that when Henderson would not allow himself to be handcuffed, Shawcroft lunged at him and ripped his shirt.

C. *Trial Court Proceedings*

Henderson was charged in an information with one count of robbery (Pen. Code,[1] § 211), one count of possession of marijuana for sale (Health & Saf. Code, § 11359) and

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1 All further statutory references are to the Penal Code unless otherwise indicated.

one count of transportation of more than 28.5 grams of marijuana (Health & Safe. Code, § 11360, subd. (a)). In addition the information alleged he had served two prior prison terms (§ 667.5, subd. (b)), had suffered a prior serious felony conviction (§ 245, subd. (a)(1), and had suffered a prior "strike" within the meaning of sections 667, subdivisions (b) through (i). Prior to trial the possession of marijuana count was dismissed on the People's motion.

During the course of deliberations, the jury foreman sent the trial court a note in which he indicated that juror No. 10 was acting in a biased manner and not following the court's instructions. The trial court spoke to the foreman and to juror No. 10. Juror No. 10 told the court she believed jurors were engaged in a lot of speculation and she was concerned she might reach a conclusion that was the product of coercion rather than what she believed. At that point the trial court admonished juror No. 10: "One moment, juror number 10. We do not want coercion in this matter. We want you to stand by the facts as you have found them, as long as you're applying the law to those facts.

"In this matter, I do not want you to capitulate to the others because of what you believe to be duress. There is nothing wrong with the jury hanging if they cannot reach a unanimous agreement.

"Can you stand firm to your position if you believe it is the right one?" Juror No. 10 responded in the affirmative.

The jury sent the trial court two more notes about juror No. 10. One note complained juror No. 10 was discrediting Shawcroft's entire testimony because of inconsistencies she found. The trial court responded by directing the jury to reread

CALJIC No. 2.21.1;[2] the trial court also reminded the jurors it was up to each individual juror to determine whether a discrepancy was important or trivial.

The jury sent the court another note which complained that juror No. 10 was acting in a biased manner and appeared to be under some stress because of the death of a close friend. Before the trial court could act on that note, the jury sent the trial court a note which stated the jury wished to continue deliberating. A short time later the jury returned a verdict finding defendant guilty of robbery and not guilty of transporting marijuana.

Henderson made a post-trial motion for release of the jurors' names and addresses. His motion was supported by a declaration from counsel which stated she had been unable to obtain the names and addresses through other means and there was "evidence juror number 10 was improperly pressured by the other jurors to arrive at a verdict through coercion."

At the hearing on the motion for release of the jurors' names and addresses, the trial court made part of the record a letter it received from juror No. 10.[3] Juror No. 10 received a certificate of appreciation from the court and had returned the certificate to the court. Juror No. 10's letter accompanied the certificate. In the letter juror No. 10

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2 CALJIC 2.21.1 states: "Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that [any] [a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. You should consider whether a discrepancy relates to an important matter or only to something trivial."

3 The juror's name and address were redacted.

recounted how unpleasant her experience had been and how discourteous the other jurors had been toward her. The letter in part stated: "At the end of deliberations, one juror presented his thought process pertaining to the facts in a manner that was acceptable to me . . . to reach the same verdict as the rest of [the] jurors. . . . I truly hope that justice was served with an appropriate verdict rendered. I will probably always have an element of doubt on whether I was able to reach a guilty verdict based on the facts or whether I had reached a point of 'giving up'."[4]

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[4] The full text of the letter is as follows: "I recently served as a first time juror on a case in your court, the People vs Henderson and Pulliam, March 12, 2003 through March 20, 2003. Although I appreciate the thought behind the enclosed Certificate of Appreciation, it is with regret that I do not want any tangible reminders of my experience serving as a juror. At the same time, I felt destroying it would somehow seem disrespectful so I ask that you dispose of it in any manner you see fit.

"I have worked for the Federal Civil Service for almost 25 years supporting the US Navy in a position of significant responsibilities. I have received awards from the Government in recognition of my ability to manage and execute programs. My position requires the ability to deal with people at all levels, and have always felt that I generally get along quite well with people. I routinely handle matters pertaining to resolution of contract issues and am quite familiar with situations where individuals see circumstances from entirely different perspectives; however, I have never been in a situation where people were intentionally disrespectful and cruel to another person in an attempt to sway their opinion. At the end of deliberations, one juror presented his thought process pertaining to the facts in a manner that was acceptable to me, and my analysis of the facts under the guidance of your instructions, and which could allow me to reach the same verdict as the rest of jurors. Even during this process, another juror was quite loudly indicating that she would not listen to any additional arguments, as it was a waste of time as I was biased and would not change my mind. It was the first time in 2-1/2 days that another juror on the panel requested that she "shush up". The foreman did a reasonable job; however, I believe he must have felt that it was important to let people express themselves, even when it crossed the bounds of courtesy and decency, and multiple times throughout the deliberations there were multiple jurors throwing unjustified accusations at me. I was never allowed to present my thought process on how I reached my conclusions due to the animosity in the room. I know in my heart without an element of doubt that I was not biased against the witness as claimed but that I had difficulty with

The trial court denied Henderson's motion. The trial court found in light of juror No. 10's statement as to how she finally agreed with an explanation offered by another juror, there was no suggestion any jury misconduct had occurred.

Henderson admitted his prior prison terms, his prior serious felony and his prior "strike." The trial court imposed the upper term of five years on the robbery conviction, which was doubled to ten years because of Henderson's prior strike conviction. The trial court imposed an additional five-year consecutive sentence because of Henderson's prior serious felony conviction. The trial court struck both of Henderson's prior prison term enhancements.

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elements of the prosecution's case. I truly hope that justice was served with an appropriate verdict rendered. I will probably always have an element of doubt on whether I was able to reach a guilty verdict based on the facts or whether I had reached a point of 'giving up'.

"I do not like to end any complaint on a negative note if at all possible, and believe in offering potential solutions or ideas that may help someone in the future. In the instructions that were sent to the deliberation room, there was an instruction discussing the fact that one should be careful not to announce one's thoughts on the verdict until the facts had been discussed. I would like to suggest that a short paragraph be included in the instructions, perhaps in the same general area, that reminds jurors to treat fellow jurors with respect and a reminder that it should be acknowledged and respected that people will have different though processes that they will use in analyzing the facts to reach a verdict. If I could have pointed to such guidance or instruction, I believe it may not have been such a difficult situation for me. I expect there to be emotion in a jury room with individuals having their convictions as to the facts; however, I would also think that I should have the right to expect that there would also be an atmosphere of respect and courtesy in the jury deliberation room as in any other chamber in the Superior Court as its such an important part of the process."

DISCUSSION

I

Jury Deliberations

In his first argument on appeal Henderson contends the trial court abused its discretion in failing to provide him with jurors' names and addresses. We find no abuse of discretion.

Following the recording of a jury's verdict in a criminal proceeding, the names and addresses of jurors are not subject to public disclosure unless ordered by the trial court upon a showing of good cause. (Code Civ. Proc., § 237, subd. (a)(2), (b).) The considerations which give rise to this protection of jurors were fully set forth by the court in *People v. Granish* (1996) 41 Cal.App.4th 1117, 1126-1127, in its discussion of an earlier case, *People v. Rhodes* (1989) 212 Cal.App.3d 541, 549-552. "As the court pointed out in [*Rhodes*], the integrity of the jury process itself must be maintained. Continued public support and participation by diverse and representative citizens is necessary, yet the voir dire process is lengthy, tedious and invasive. If jurors were also to be routinely subjected to posttrial interrogation, many, if not most, would avoid service. If jurors' names, addresses and telephone numbers were freely given to the losing party, jurors would be subject to the risk of harassment. Routine disclosure might also interfere with the incentives against jury tampering: '"A single juror who reluctantly joined in a verdict is likely to be sympathetic to the overtures of defeated parties, and to be persuadable to the view that his own consent rested upon false or impermissible considerations; the truth will be hard to ascertain. In the process, the trier itself will be

tried, all at the behest of a dissatisfied party aided by the second thoughts of a vaguely uncomfortable juror." [Citation.]' [Citation.] Free and open discussion amongst the jurors during deliberations "'. . . will surely be stifled"' and the policy favoring finality of verdicts undermined if disclosure of jurors' names, addresses and telephone numbers were unlimited. [Citation.]

"On the other hand, there is also a strong public interest in the ascertainment of truth in judicial proceedings, and a verdict reached by prejudicial juror misconduct should not be permitted to stand.

"In view of the competing policies, including the jurors' right to privacy and the need to discover potential misconduct, the *Rhodes* court proposed a balancing of interests to avoid abuses and misuse of juror information, and other ills, while permitting jury misconduct to be exposed. The *Rhodes* court held that juror information could be disclosed upon a timely motion and 'a sufficient showing to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial . . . . [¶] Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information as a matter of right in each case. This rule safeguards both juror privacy and the integrity of our jury process against unwarranted "fishing expeditions" by parties hoping to uncover information to invalidate the jury's verdict. At the same time, it protects a defendant's right to a verdict

uninfluenced by prejudicial juror misconduct by permitting, upon a showing of good cause, access to juror information needed to investigate allegations of juror misconduct.' [Citation.]" (*People v. Granish, supra*, 41 Cal.App.4th at pp. 1126-1127, fn. omitted.)

Because *Rhodes* was decided before enactment of Code of Civil Procedure section 237, there was some disagreement over whether the substantive standards set forth in *Rhodes* and adopted in *Granish* governed motions made under the statute. (See *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1321-1322, fn. 8.) That dispute has been resolved and our courts now uniformly hold that in enacting Code of Civil Procedure section 237, the Legislature intended to adopt the balancing test set forth in *Rhodes*. (*Ibid*.)

Here Henderson did not establish the likely occurrence of any jury misconduct. The questions and statements of the jury during deliberations, including juror No. 10's statements and her letter, did not demonstrate anything more than the sort of strenuous disagreement that is common and indeed encouraged in our jury system. For instance, in *People v. Keenan* (1988) 46 Cal.3d 478, 540, it was alleged in support of a motion for a new trial that, during deliberations, a juror had confronted the lone holdout, an elderly woman, stating: "'If you make this all for nothing, if you say we sat here for nothing, I'll kill you and there'll be another defendant out there -- it'll be me.'" (*Ibid.)* The Supreme Court concluded, as a matter of law, this incident did not amount to prejudicial misconduct impeaching the verdict. Although the outburst "was particularly harsh and inappropriate, but as the trial court suggested, no reasonable juror could have taken it literally. Manifestly, the alleged 'death threat' was but an expression of frustration, temper, and strong conviction against the contrary views of another panelist.

"'Jurors may be expected to disagree during deliberations, even at times in heated fashion.' Thus, '[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression.' [Citation.]" (*People v. Keenan, supra*, 46 Cal.3d at p. 541, fn. omitted.)

Similarly, in the context of rejecting a defendant's claim the trial court was required, during deliberations, to investigate potential coercion of a holdout juror by the majority, the Supreme Court noted: "[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means. To probe as defendant suggests, in the absence of considerably more cogent evidence of coercion, would "'deprive the jury room of its inherent quality of free expression.'" [Citations.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.)

Nothing in this record comes close to what was alleged in *Keenan*. Rather, juror No. 10's statements suggest the heated and strenuous discussions expected from time to time from jurors who take their responsibilities seriously. Thus, in impliedly finding the privacy interests of the jurors outweighed Henderson's need for information in support of his investigation of potential misconduct, the court did not abuse its discretion. (*People v. Granish, supra,* 41 Cal.App.4th at pp. 1126-1127.)

II

Jury Instructions

A. *Accidental Force*

The prosecution offered and, without objection, the trial court gave, as Jury Instruction No. 1, the following special instruction on force: "Force, as used in these instructions, must be intentional and must be more than accidental contact." In addition to this instruction the trial court gave the jury CALJIC No. 9.40 which states in pertinent part: "Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specfic intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code section 211. [¶] . . . [¶]

"Where the property is originally taken by the defendant without some use of force or fear and thereafter, while retaining possession of some or all of the property taken, the defendant uses force or fear to prevent the owner or employee from recovering the property or to facilitate an escape, the crime of robbery is committed."

The prosecution's theory was that in physically resisting Shawcroft's efforts to restrain him, Henderson employed the force necessary to commit robbery. This theory of robbery is well established: "[A] robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*People v. Estes* (1983) 147 Cal.App.3d 23, 28-29.)

Contrary to Henderson's argument, Jury Instruction No. 1, considered along with CALJIC No. 9.40, did not diminish the level of force needed to find him guilty of robbery. "'The terms "force" and "fear" as used in the definition of the crime of robbery have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors.' [Citation.]" (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.) Admittedly, where there is a dispute about whether force was used initially in taking property, the cases have pointed out that robbery requires more force than is needed to take the property from the person of the victim. (*People v. Wright* (1996) 52 Cal.App.4th 203, 210; *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on other grounds *People v. Mosby* (2004) 33 Cal.4th 353, 365, fns. 2, 3.) "A pickpocket touches the victim in extracting a wallet from his pocket, but this does not make the pickpocket a robber. The force required for robbery is more than 'just the quantum of force which is necessary to accomplish the mere seizing of the property.' [Citation.]" (*People v. Garcia, supra*, 45 Cal.App.4th at p. 1246.)

However, the degree of force used is immaterial if it is more than the force needed to take property from the victim. In *People v. Garcia* "[t]he evidence was defendant approached the cashier while the register drawer was open and gave her a slight push, 'like a tap,' on her shoulder with his shoulder. Fearful defendant might be armed, the cashier moved away. Defendant then reached into the open register, grabbed the money and escaped. The cashier was not injured." (*People v. Garcia, supra,* 45 Cal.App.4th at p. 1246.) In concluding this was enough force to establish robbery, the court stated: "The defendant did not simply brush against the cashier as he grabbed for the money. He

intentionally pushed against her to move her out of the way so he could reach into the register. . . . [P]ushing the cashier went beyond the 'quantum of force which [was] necessary' to grab the money out of the cash register. We agree defendant appears to have been rather polite in his use of force, giving the cashier a mere 'tap.' Nevertheless, for purposes of the crime of robbery, the degree of force is immaterial. [Citation.]" (*Ibid*.)

Here, there is no dispute Henderson pushed Shawcroft away from himself when Shawcroft attempted to restrain him. In this factual context Jury Instruction No. 1, which required more than accidental touching, accurately described the nature of the force required under the prosecution's theory. Under the law and under Jury Instruction No. 1, if Henderson had only accidentally touched Shawcroft -- for instance if his arm or shoulder inadvertently touched Shawcroft when he turned to talk to her -- no robbery would have occurred. On the other hand, under the law and the instruction, the prosecution's evidence that Henderson used deliberate force and fear in trying to escape from Shawcroft was plainly sufficient to establish robbery. (See *People v. Garcia, supra,* 45 Cal.App.4th at p. 1246; *People v. Estes, supra*, 147 Cal.App.3d at p. 28.) Hence the trial court did not err in giving Jury Instruction No. 1.

B. *Sua Sponte Instruction on Theft*

Henderson argues the trial court had a duty to instruct sua *sponte* on the lesser included offense of theft because the evidence was sufficient to justify a conviction on the lesser offense. On this record we find no duty to instruct on theft.

" ' " 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. . . . The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' . . . That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present . . . , but not when there is no evidence that the offense was less than that charged." ' (Citations omitted.) Thus, whether the trial court erred in failing to give an instruction on the lesser included offense turns on whether there was some evidentiary basis on which the jury could have found the offense to be less than robbery." (*People v. Garcia, supra,* 45 Cal.App.4th at p. 1246.)

In *Garcia*, in light of the evidence the defendant had pushed the victim away from the register with his shoulder and that in fear the victim moved, the court found there was no dispute that force sufficient to constitute robbery had been used. (*People v. Garcia, supra,* 45 Cal.App.4th at p. 1246.) Thus the court concluded no theft instruction was required. "Here defendant was either guilty of robbery or not guilty of any crime." (*Ibid*.)

The record here is indistinguishable from the record considered in *Garcia*. There was no dispute Henderson resisted Shawcroft's attempt to restrain him. Indeed, in her closing argument, Henderson's counsel stated: "He was not obligated to go into that store. The woman had no authority over him if he didn't take anything from the store,

and there is no evidence, no credible evidence before you, except this woman who has so far lied a lot, that anything was taken from the store. She didn't have any authority over him, and with her acting out of control like that, he had a right to defend himself, and he had a right to leave the scene." Here as in *Garcia*, Henderson was either guilty of robbery or guilty of no crime. Under those circumstances, no theft instruction was required.[5]

III

Sentencing

In imposing the upper term on Henderson's robbery conviction, the trial court found no mitigating factors and four aggravating circumstances: planning of the crime (Cal. Rules of Court,[6] rule 4.421(a)(8)) , violence in carrying out the crime (rule 4.421(b)(1)), numerous adult convictions of increasing seriousness (rule 4.421(b)(2)) and a prior prison term (rule 4.421(b)(3).)

Contrary to Henderson's argument, imposition of the upper term did not offend his rights under the Sixth Amendment of the United States Constitution, as recently articulated by the Supreme Court in *Blakely*.

Assuming, without deciding, that California's determinate sentencing law (DSL), section 1170 et. seq., does not on its face conform with the standards set forth in *Blakely*,

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5 By way of a petition for writ of habeas corpus (D044061), defendant argues his counsel rendered ineffective assistance of counsel by failing to ask for a theft instruction. Because there was no factual basis for such an instruction, defendant was not prejudiced by his counsel's failure to ask for one. Hence by separate order we have denied his petition.

here the sentence imposed nonetheless meets the requirements the Supreme Court established in *Blakely*. In particular, Henderson admitted two of the factors the court relied upon, his prior adult convictions and his prior prison term. In light of his admissions, under *Blakely* the trial court was free to rely upon the admitted circumstances in sentencing him even though they had not been found by the jury. (*Blakely, supra*, ___U.S.___[124 S.Ct. at p. 2537].) Because the trial court found no mitigating circumstances, it is clear to us the trial court would have and could have imposed the upper term based on Henderson's prior convictions and prior prison term alone. Thus the fact the trial court also relied upon two factors which arguably required jury findings did not prejudice Henderson.

Henderson also contends the trial court committed *Blakely* error in finding that he had committed a prior serious felony and on that basis imposing a mandatory five-year enhancement and doubling the base term on the robbery conviction. (See §§ 667, subd. (a)(1), 668, 1192.7, subd. (c).) Henderson points out his prior felony was a conviction for assault within the meaning of section 245, subdivision (a)(1), and that such assault may be committed either by assault with a deadly weapon or by means of force likely to produce great bodily harm. Because only assault with a deadly weapon qualifies as a serious felony under section 1192.7, subdivision (c), he argues the trial court was required to specifically find that he committed the assault by way of assault with a deadly weapon rather than by means of force likely to produce great bodily harm. Because he

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6 All further rule references are to the California Rules of Court.

made no such specific admission, he argues the trial court's finding he committed a serious felony violated his Sixth Amendment rights as articulated in *Blakely*.

However, Henderson ignores the fact he expressly waived his right to a jury trial on the priors well before he actually pled to them. Thus even if there had been no plea, in light of his earlier jury waiver the trial court could have, without a jury and consistent with *Blakely*, found that he suffered a prior serious felony. In short, where as here a defendant has expressly given up his right to a jury, it is difficult to perceive any *Blakely* error. In any event our review of the record shows that the information alleged Henderson's prior conviction for violation of section 245, subdivision (a)(1), was a serious felony "within the meaning of Penal Code section[s] 667(a)(1), 668 and 1192.7(c)." The record also discloses that in taking Henderson's plea to the prior serious felony conviction, the trial court described it as a prior serious felony which would require the trial court to impose a five-year enhancement and double whatever base term the court imposed on Henderson's robbery conviction. On this record, Henderson's express plea to the information can only be interpreted as an admission that his assault conviction was a conviction which qualified as a prior serious felony. Because only an assault with a deadly weapon qualifies as a serious felony, his plea must be interpreted as an admission to commission of that crime. In this regard we note the well-established principle that a guilty plea constitutes an admission of all of the elements of a charged offense. (*People v. Guerrero* (1993) 19 Cal.App.4th 401, 407-408.)

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.